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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**VIDEO SOFTWARE DEALERS and  
ENTERTAINMENT SOFTWARE ASSOCIATION,**

Plaintiffs,

v.

**ARNOLD SCHWARZENEGGER, in his official  
capacity as Governor of the State of California;  
BILL LOCKYER, in his official capacity as  
Attorney General of the State of California;  
GEORGE KENNEDY, in his official capacity as  
Santa Clara County District Attorney, RICHARD  
DOYLE, in his official capacity as City Attorney for  
the City of San Jose, and ANN MILLER RAVEL, in  
her official capacity as County Counsel for the  
County of Santa Clara,**

Defendants.

CASE NO. C 05 4188 RMW RS

**OBJECTIONS TO  
PLAINTIFFS' REQUEST FOR  
JUDICIAL NOTICE BY THE  
GOVERNOR AND  
ATTORNEY GENERAL;  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

Hearing: December 9, 2005

Time: 9:00 a.m.

Courtroom: 6

Judge: The Honorable  
Ronald M. Whyte

1 Defendants Governor Arnold Schwarzenegger and Attorney General Bill Lockyer  
2 (collectively, the "State") respectfully object to Plaintiffs' Request for Judicial Notice, filed  
3 November 23, 2005, on the following grounds:

4 1. Plaintiffs' Exhibit 3 to their Request is not properly subject to judicial notice under  
5 Rule 201 of the Federal Rules of Evidence. Exhibit 3 purports to be an incomplete portion of a  
6 transcript of court proceedings held on November 14, 2005, in a Northern District of Illinois  
7 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
8 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite  
9 the contents thereof for the truth of the matter asserted therein as providing evidentiary support  
10 for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 6:12-16.);

11 2. Plaintiffs' Exhibit 4 to their Request is not properly subject to judicial notice under  
12 Rule 201 of the Federal Rules of Evidence. Exhibit 4 purports to be an incomplete portion of a  
13 transcript of court proceedings held on November 15, 2005, in a Northern District of Illinois  
14 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
15 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite  
16 the contents thereof for the truth of the matter asserted therein as providing evidentiary support  
17 for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 6:12-20; n. 6; 8:9-28;  
18 10:1-8.);

19 3. Plaintiffs' Exhibit 5 to their Request is not properly subject to judicial notice under  
20 Rule 201 of the Federal Rules of Evidence. Exhibit 5 purports to be a declaration and attached  
21 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois  
22 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to  
23 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the  
24 truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion  
25 for preliminary injunction. (Pltfs.' Reply, 7:17-22.);

26 4. Plaintiffs' Exhibit 6 to their Request is not properly subject to judicial notice under  
27 Rule 201 of the Federal Rules of Evidence. Exhibit 6 purports to be a declaration and attached  
28 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois

lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 7:17-22.);

5. Plaintiffs' Exhibit 7 to their Request is not properly subject to judicial notice under Rule 201 of the Federal Rules of Evidence. Exhibit 7 purports to be an incomplete portion of a transcript of court proceedings held on November 14, 2005, in a Northern District of Illinois lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to acknowledge the existence of an incomplete portion of the transcript of a different court, but cite the contents thereof for the truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 9:6-12.);

6. Plaintiffs' Exhibit 8 to their Request is not properly subject to judicial notice under Rule 201 of the Federal Rules of Evidence. Exhibit 8 purports to be a declaration and attached exhibit from an individual not a party to the present action, filed in a Northern District of Illinois lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 7:17-22.).

## **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO REQUEST FOR JUDICIAL NOTICE**

The State submits the following memorandum of points and authorities in support of their objections to Plaintiffs' Request for Judicial Notice.

### **INTRODUCTION**

For the first time through their reply papers, Plaintiffs attempt to introduce incomplete hearing transcripts, that do not even identify the witness, and various declarations purportedly from the files of another federal court in a different jurisdiction concerning a lawsuit in which neither the State, nor any other defendants, were parties or privy to the action, and which dealt with a separate and distinct law from that at issue here. Plaintiffs ask this Court to take judicial

1 notice of these materials, not to establish the existence of the filing of these materials in another  
2 court, but to introduce the contents thereof as evidence in the instant case. Not only is this  
3 attempt improper because the contents of these materials cannot be considered “adjudicative  
4 facts” subject to judicial notice under Rule 201, but the contents of these materials constitute  
5 textbook hearsay which are not admissible for any purpose. Instead of attempting to properly  
6 introduce evidence to support their claims through their moving papers as required, Plaintiffs  
7 attempt to sneak this material in for the first time through their reply papers under the guise of a  
8 request for judicial notice. Plaintiffs’ attempt must fail, as under no circumstances can the  
9 contents of these incomplete transcripts and declarations be considered “adjudicative facts”  
10 subject to judicial notice by this Court.

11 **I. The Contents of Transcripts of Proceedings and Declarations Filed In Another**  
12 **Court Are Not Properly Subject to Judicial Notice.**

13 Plaintiffs ask this Court to take judicial notice of the contents of incomplete portions of  
14 transcripts of proceedings held in an Illinois lawsuit in which the State was not a party. They  
15 also ask this Court to judicially notice certain declarations submitted to that court. The sole  
16 purpose of Plaintiffs’ request is to attempt to introduce into evidence material that Plaintiffs  
17 contend support their position in the present motion for preliminary injunction. Plaintiffs cite to  
18 these out of court transcripts and declarations as if they somehow constitute admissible evidence  
19 before this Court. But Rule 201 only provides for the taking of judicial notice of an  
20 “adjudicative fact.” And the only adjudicative fact properly subject to judicial notice is “one not  
21 subject to reasonable dispute in that it is either (1) generally known within the territorial  
22 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to  
23 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid., 201, subd. (b). The  
24 out of court statements contained in these transcripts and declarations do not meet the definition  
25 of adjudicative facts, and are therefore not properly subject to judicial notice.

26 In the Ninth Circuit, it is well established that “[a]s a general rule, a court may not take  
27 judicial notice of proceedings or records in another cause so as to supply, without formal  
28 introduction of evidence, facts essential to support a contention in a cause then before it.” *M/V*

1 *American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983);  
 2 *accord*, *Wyatt v. Terhune*, 315 F.3d 1108, 1114 n. 5 (9th Cir. 2003) (factual findings in one case  
 3 not admissible for their truth in another case through judicial notice); *Pollstar v. Gigmania LTD.*,  
 4 170 F. Supp. 2d 974, 978-79 (E.D. Cal. 2000) (“Because there is no authority for judicial notice  
 5 of pleadings in an unrelated case, the court declines to take judicial notice of the [other court]  
 6 pleadings.”)

7 This established Ninth Circuit rule is consistent with the leading treatises on the Federal  
 8 Rules of Evidence. “[A] court may not take judicial notice of the truth of an evidentiary record  
 9 in another action tried in the same court where there is no conclusive affect to the judgment  
 10 noticed . . . . It is not permissible to bind a party a party to the evidence in that record except  
 11 where the party was joined in or privy to the action. Furthermore, although a court may take  
 12 judicial notice of a prior proceeding, a court cannot take judicial notice of the testimony given at  
 13 that prior proceeding, as such testimony is hearsay.” 29 Am. Jur. 2d, Evidence § 134 (Aug.  
 14 2005) (internal footnotes omitted); *see also*, 21B Fed. Prac. & Proc., Evidence 2d § 5106.4 (“It  
 15 seems clear that a court cannot notice pleadings or testimony as true simply because these  
 16 statements are filed with the court.”); 31A C.J.S. Evidence, § 58 (June 2005).

17 The cases cited by Plaintiffs do not support their request, as the evidentiary submissions  
 18 admitted in both *Biggs* and *Mullis* were part of the underlying matters directly at issue in those  
 19 cases. *Biggs v. Terhune*, 334 F.3d 910, 915 n.3 (9th Cir. 2003) (judicial notice of transcripts of  
 20 plaintiff’s hearing before the Board of Prison Terms for purposes of reviewing Board’s  
 21 evidentiary basis for conclusions reached after hearing) ; *Mullis v. United States Bank. Ct.*, 828  
 22 F.2d 1385, 1388 n.9 (9th Cir. 1987) (judicial notice of “pleadings, orders and other papers on file  
 23 in the underlying bankruptcy case.”) Here, by stark contrast, Plaintiffs request that unrelated  
 24 evidence from an out of state lawsuit in a different jurisdiction in which the State was not a party  
 25 be admitted as evidence for purposes of supporting the factual basis of their claim. No case law  
 26 supports Plaintiffs’ request.

27 Plaintiffs ask this Court to judicially notice incomplete transcripts and declarations submitted  
 28 to an Illinois court not for the purpose of establishing the existence of such records, but for the

1 sole purpose of citing the contents of such records for improper evidentiary purposes. Instead of  
 2 attempting to properly introduce evidence to supports their claims through their moving papers,  
 3 Plaintiffs seek an end-run around the rules of evidence. But Rule 201 is not a loophole in the  
 4 proper evidentiary procedure. The contents of the incomplete transcripts and declarations cited  
 5 by Plaintiffs are not “adjudicative facts” properly subject to judicial notice under any  
 6 circumstance. Therefore, the State respectfully requests that Plaintiffs’ Request for Judicial  
 7 Notice be denied as to Exhibits 3 through 8, and that the citations to these exhibits be stricken  
 8 from the record.

9 **II. The Contents of The Incomplete Transcripts and Declarations Cited By**  
 10 **Plaintiffs Constitute Inadmissible Hearsay.**

11 Plaintiffs cite to the contents of these incomplete transcripts and declarations in an effort to  
 12 rebut the State’s properly submitted evidence, contained in the legislative record, demonstrating that  
 13 the State Legislature was presented with substantial evidence that playing extremely violent video  
 14 games can be harmful to minors. Instead of citing to the legislative record to examine the evidence  
 15 considered by the Legislature in support of AB 1179, Plaintiffs attempt to introduce testimony  
 16 purportedly submitted to a federal court in Illinois regarding a separate and distinct video game law,  
 17 with separate and distinct defendants. Of course Plaintiffs do not, as they cannot, claim that the  
 18 California Legislature considered such material in passing the law at issue here. Instead, Plaintiffs’  
 19 sole purpose in attempting to introduce these incomplete transcripts and declarations is to cite them  
 20 for the truth of the allegations asserted therein – black letter hearsay. Because the contents of these  
 21 materials constitute hearsay, Plaintiffs’ Request for Judicial Notice should be denied and Plaintiffs’  
 22 citation to these materials stricken from the record.

23 Rule 801 of the Federal Rules of Evidence defines hearsay as “a statement, other than one  
 24 made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth  
 25 of the matter asserted.” Hearsay is not admissible absent an applicable exception. Fed. R. Evid., R.  
 26 801. No possible exception to the hearsay rule applies in the instant case.

27 The statements contained in Exhibits 3 through 8 each meet the definition of hearsay, as not  
 28 a single one was made while testifying before this Court. Because the sole purpose of Plaintiffs’

1 attempt to introduce Exhibits 3 through 8 to the Court is to prove the truth of the allegations  
2 contained therein, each constitutes inadmissible hearsay. Therefore, the State respectfully requests  
3 that Plaintiffs' Request for Judicial Notice be denied as to Exhibits 3 through 8 and Plaintiffs' citation  
4 to these materials be stricken from the record.

5 **CONCLUSION**

6 For all of the foregoing reasons, the State respectfully requests that Plaintiffs' Request for  
7 Judicial Notice be denied as to Exhibits 3 through 8 and Plaintiffs' citation to these materials be  
8 stricken from the record.

9  
10 Dated: December 1, 2005

11  
12 Respectfully submitted,

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18  
19 /s/ Zackery P. Morazzini

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23 General Bill Lockyer  
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